IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12653

OAKLAND DOCK AND WAREHOUSE COMPANY,
a Corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

WM H. NEBLETT,
615 Latham Square Bldg.,
Oakland, California,
Attorney for Appellant.

Printed by Law Reporter Ptg. Co., 518 5th St., Wash., D. C.

TITLE INDEX

Page

PRELIMINARY STATEMENT 1

THE QUESTION OF JURISDICTION AS PRESENTED BY APPELLEE IS OUTSIDE THE RECORD 2

APPELLEE'S BRIEF DOES NOT CONFORM TO RULE 20 OF THIS COURT. THE BRIEF SHOULD BE STRICKEN BECAUSE IT IS ABUSIVE, FRIVOLOUS AND MERE SHAM ... 6

Cases Cited

L. A. & Salt Lake Ry. Co. v. United States, Ct. of App. 9th Cir., 140 Fed. 2d 436, 438 ..... 2, 8

Gaines v. Thompson, the Secretary of the Interior, 74 U. S. 347; 19 L. Ed. 62 3

Hubert Work, Secretary of the Interior, 267 U. S. 175, 69 L. Ed. 561 3

Bridges v. United States (Ct. of App. 9th Cir.), 184 Fed. 2d 881 6

U. S. v. Coplan (Ct. of App. 2nd Cir.), 185 Fed. 2d 854 6

Statutes Cited

National Industrial Reserve Act of 1948, 50 USCA, Sections 451-462 3

National Security Act, 5 USCA, Sections 171, 171(a)-171(h) 3, 7

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12653

OAKLAND DOCK AND WAREHOUSE COMPANY,
a Corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENTS *

No statement of fact made in appellant's brief is controverted by the appellee. Thus the correctness of appellant's STATEMENT OF THE CASE is conceded (Par. 3, Rule 20 of This Court).

Appellee's brief presents the single question: Whether or not the District Court *had jurisdiction* to grant the temporary injunction on the terms and conditions of the bill of sale without considering its reference to the quitclaim deed and its subsequent modification?

The question of whether or not the District Court *has*

* Italics ours unless otherwise specified.

jurisdiction to grant an injunction in a proper case was not raised by the appellant in the court below or specified as error in its brief. The record shows that this is not a proper case for an injunction. For these reasons the numerous cases cited by appellee in answer to its question of jurisdiction will not be digested by appellant. Those cases have no bearing on the questions presented by the record. Sensing the inapplicability to the record of the cases it cites appellee goes outside of the record for all of the evidence used in support of its argument. Appellee's brief violates Rule 20 of This Court and comes within the procedure required by Subdivision 7 of the Rule.

THE QUESTION OF JURISDICTION AS PRESENTED BY APPELLEE IS OUTSIDE THE RECORD

The bill of sale (R. 7) standing alone *does not,* as appellee contends, contain *any terms or conditions preserving the machinery, machine tools, and equipment for national defense uses* (Point II, pp. 19-26, Appellant's Brief). A national security clause is *made applicable to the machinery, machine tools, and equipment by reference in paragraphs 1 and 2 of the bill of sale* (R. 9) to the security clause in the quit claim deed (R. 59-65). This reference makes the bill of sale and the quit claim deed, together with its subsequent modification, one instrument, and they must be so construed.

> *L. A. & Salt Lake Ry. Co.* v. *United States,* Ct. of App. 9th Cir., 140 Fed. 2d 436

The *modification of the security clause* (R. 73), dated February 28, 1950, *released the security clause from the appellant's machinery, machine tools and equipment* (Point II, p. 19, Appellant's Brief). The Letter of Intent (Government's Exhibit No. 1, pages 8-10 of Appendix B to Appellant's Brief), the Bill of Sale (R. 7), the original Quit Claim Deed (R. 52), the Chattel Mortgage (R. 66), and the Modifications of the Covenants and conditions of the Quit Claim Deed (R. 73) *were all discretionary administrative*

determinations made by the Munitions Board under the authority granted to it by the Secretary of Defense.

> *National Security Act,* 5 USCA, Sections 171, 171(a)-171(h);
> *National Industrial Reserve Act of 1948,* 50 USCA, Sections 451-462.

The administrative determination of the Munitions Board to modify this national security clause was made under the powers granted by these Acts of Congress to the Secretary of Defense and by him delegated to the Munitions Board. The clause was modified, February 28, 1950, on application of the appellant, made pursuant to paragraph 3 of the original quit claim deed (R. 59), which paragraph is as follows:

> "3. *The grantee,* or the Secretary (as hereinafter defined), may at any time *cause a re-examination of the necessity for continuing the dormant estate* upon the plant *or any portion thereof.* Such estate may be discontinued *at any time during* the twenty-year period when the Secretary determines such action consistent with the national defense interests of the United States."

These administrative determinations made by the Munitions Board under the direction of the Secretary of Defense *will not be interfered with by the courts.* An *officer* to whom public duties are confided by law *is not subject to the control of the courts in the exercise of judgment and discretion which the law reposes in him as a part of his official functions.* This doctrine is applicable *to the writ of injunction.*

> *Gaines* v. *Thompson, the Secretary of the Interior,* 74 U. S. 347; 19 L. Ed. 62.

The *courts have no power to control the exercise by an officer of a discretion vested in him by Congressional act.*

> *Hubert Work, Secretary of the Interior,* 267 U. S. 175, 69 L. Ed. 561.

The District Court *was without power to attempt the administration by injunction on other process* the national security clause contained in the papers of this case. Thus the lower court *had no power* to find or conclude *that the modified security clause did not remove the clause from appellant's machinery, machine tools, and equipment.* The applicable statutes confide *the right of that determination* solely in *the Secretary of Defense and his delegate, the Munitions Board.* As far as the record goes the Secretary and the Board appear to be *satisfied with the modified clause* and *intend to abide by it.* The Navy Department's action appears from the record to be *pure insubordination to its superiors* and expresses an *unwillingness to accept the Congressional direction contained* in The Unification Act (*National Security Act* as amended, 5 USCA, Section 171 *et seq.*). In the circumstances, the temporary injunction destroys the one purpose of the *Unification Act* and the *National Industrial Reserve Act of 1948.* These questions have all been settled in favor of appellant's contentions by the recent decision of This Court in *Monolith Portland M. Co.* v. *RFC,* 178 Fed. 2d 854, and the other cases to the same point, cited by appellant at page 29 of its brief. There being no possible answer to the doctrine of these cases appellee follows the normal bureaucratic procedure of ignoring them.

Pursuant to the administrative determination so made appellant went ahead and sold some of its machinery, machine tools, and equipment, paid the Government the release prices fixed in accord with these administrative decisions and obtained releases from General Services Administration in the circumstances detailed in Point IV, pp. 29-31 of Appellant's Brief. Neither *the Secretary of Defense nor his delegate, the Munitions Board,* has *made any objection* to the sales made by appellant. The *Navy Department,* which has never *had any statutory or delegated authority* here, is the sole objector (Point I, p. 12, Appellant's Brief).

Appellee (Appellee's Brief, pp. 15-21), realizing that the temporary injunction is void on the face of the record,

goes outside the record for support of the order granting the injunction and brings in for the first time (Appellee's Brief, Appendices I and II) *a purported delegation of authority* from the Munitions Board to the Navy Department to administer the security clause here involved. The *purported delegation was not* shown to counsel or *offered in evidence* at the hearing on the order to show cause for a temporary injunction. Therefore, appellant believes that This Court will disregard it. However, to demonstrate how loosely and carelessly some of our bureaucratic officials handle the business of the public, appellant is constrained to remark that, if the document had been offered at the hearing it would have been rejected by the lower court for these reasons: (1) The Munitions Board *had no power to redelegate the authority which the Secretary of Defense had delegated to it;* (2) The Secretary of Defense *could not and did not authorize the Board to make a redelegation to the Navy Department;* (3) The purported delegation *was not approved by the Board;* (4) The Board *did not and could not authorize one Harry E. Blythe,* who signed it, *to make this, or any other decision for the Board;* (5) finally, and most important of all is that both the *Navy Department* and *its Secretary* are *official strangers to the Board.* A delegation of authority *can only be made to* a *subordinate.* It is doubtful if the Navy *would concede* that it is a *subordinate* of the Munitions Board. The *purported delegation* seems to be *an attempt* to hold on to *some part of the authority* which was taken away from the Navy by the *Unification Act.*

The temporary injunction giving the Secretary of the Navy *the authority to waive the national security clause by permitting the sale of machinery, machine tools and equipment* would, in light of this purported delegation, be void on the face of the record, even though the subsequent modification of the security clause had not been made. Appendices I & II to appellee's brief were promulgated August 31, 1949. The original bill of sale and quit claim deed were made June 1, 1949; the modification of the security clause, February 28, 1950. This suit was filed June

8, 1950. The reason why the purported delegation was not shown at the trial is obvious. If the Government had called it to the attention of the District Court at the hearing on the temporary injunction, the finding that *the Secretary of the Navy had jurisdiction to modify the clause would* probably not have been made.

APPELLEE'S BRIEF DOES NOT CONFORM TO RULE 20 OF THIS COURT. THE BRIEF SHOULD BE STRICKEN BECAUSE IT IS ABUSIVE, FRIVOLOUS AND MERE SHAM.

Appellee seems to contend that the Secretary of the Navy has full authority over appellant's property because the complaint, filed by the Attorney General on behalf of the United States, alleges that theory as the basis for a cause of action against appellant. The Attorney General is not sacrosant. Of course, the Attorney General may file a suit for his client; he is counsel for the United States. In filing suits for it he has made his proportion of errors. The motives of the Attorney General, in the prosecution of a suit or other proceedings for the United States against a citizen, may be questioned in the courts.

> *Bridges* v. *United States* (Ct. of App. 9th Cir.), 184 Fed. 2d 881;
> *U. S.* v. *Coplon* (Ct. of App. 2nd Cir.), 185 Fed. 2d 854.

The Bridges and Coplon cases, and the tone of appellee's brief demonstrate that the Attorney General's Office has not been free from the hysteria which has of late controlled the actions of some of the government departments and their bureaus. In recent times the mere mention of national defense in connection with a governmental function leads officers, charged with the administration of law, to discard reason and discretion in order to prove their zeal to persecute all those who dare to disagree with them. This attitude of our administrative officers helps to explain the frivolous and sham character of appellees brief,

set on a professional level far below that of the dignity which should mark presentations to This Court by members of its bar.

The bitter argument of appellee is designed to conceal from This Court *the purpose* of the Navy Department *to avoid performance by the Government of a valid contract, made between it and a citizen at the direction of the Department of Defense,* in which the Navy Department *is a subordinate unit* (Testimony of Admiral Klein, R. 252).

> *National Security Act,* as amended, 5 USCA, Sections 171 *et seq.*

We have already shown how the appellee based about half its argument upon Appendix I of its brief, which document is not the record. We now show how the remaining part of the argument is likewise based upon matter which is not a part of the record. Knowing that the record shows that *the modified security clause of February 28, 1950, removed the clause from appellant's machinery, machine tools, and equipment,* the appellee again *goes outside* the record for evidence *it proposes to offer, if this case ever goes to trial.* The whole argument to offset the modification of the security clause of February 28, 1950, is based upon the following offer of proof, admittedly not a part of the record, which the appellee proposes to produce at the time of trial. The offer is made at pages 7 and 8 of Appellee's Brief and is as follows:

> "There is no *evidence* in the record bearing on the intent of the parties in executing the February 28, 1950, modification. Appellant believes that the whole question of the modification of the deed is irrelevant, because the case turns on the provisions of the bill of sale. But if, at the trial on the permanent injunction, appellant succeeds in bringing up this point, the Government is prepared to show, by competent evidence, that the changes of which appellant makes so much, were in fact made upon the request of counsel for the appellant and solely upon his representation that he wished to avoid any duplication and overlapping between the two instruments, and desired to be put in a

better position subsequently to request removal of the restrictions contained in the bill of sale without having to request a second modification of the deed. The Government can further prove that this was the *sole* ground for the change, and that this fact was brought home both to appellant's president and to its counsel. For appellant now to argue that these changes made under these circumstances, amounted to a surrender by the Government of its rights, approaches chicanery."

The entire quoted statement is *false* and appears to have been *deliberately so made.* There *is evidence in the record* establishing *the intent of the parties* executing the modified security clause (Government's Exhibit No. 1, p. 8, Appendix B, Appellant's Brief). The Letter of Intent is digested on pages 3 and 4 of appellant's brief and its legal effect is presented between pages 29-31. The unsupported charges of fraud and chicanery leveled by appellee at the appellant's president and its counsel—Welburn Mayock and Wm. H. Neblett, members of the Bar of This Court, and A. L. Wheeler of the District of Columbia Bar (R. 241), may move This Court to strike appellee's brief.

The offense is much aggravated because the offered testimony is wholly false. There is no such evidence, and whoever persuaded the appellee to include the offer of it in the brief is guilty of an attempted deception of This Court. It is surprising that appellee allowed such an offer to go into its brief, not only because of its false character, but also because the proposed evidence would be inadmissible. Appellee must know that *oral evidence is inadmissible* to establish *the intention of the parties* to the written modified security clause, even though *one of the parties is the United States.*

Los Angeles & Salt Lake Ry. Co. v. *United States,* (Ct. of App. 9th Cir.) 140 Fed. 2d 436, 438.

That case not only settles in appellant's favor the point to which it was just cited; it also settles, in favor of appellant's contention, that the national security clause here involved will be construed by This Court in accord with California law. This Court said:

"Since the *land* they describe *is situated in California, interpretation of the deeds is governed by California law* (citing and quoting sections 1636, 1639, 1641 of the California Civil Code). * * *

"Section 1066 of the California Civil Code provides that, with certain inapplicable exceptions, grants are to be interpreted in like manner with contracts in general. * * *

"The intention of the parties to the deeds here involved can, and therefore must, *be ascertained from the deeds alone.* It is reasonably practicable to give effect to every part of each deed. Therefore, *in ascertaining the intention of the parties, the whole of each deed must be taken together.*"

What now becomes of the contention of appellee, that *the bill of sale stands alone* and *cannot be construed with the original quit claim deed or its later modification?* The question is answered in the last sentence of the foregoing quotation. The letter of intent, the bill of sale, the original quit claim deed and its subsequent modification are all *parts of the same transaction* and they *must be construed together.*

Appellant contends that because appellee has violated, as heretofore shown, Rule 20 of this Court, and because its brief is sham and frivolous, and because it makes charges of fraud and chicanery against the president and counsel for the appellant, *its brief should be stricken, or, at least, the penalties of paragraph 7 of Rule 20 of this Court should be imposed upon appellee.*

The order granting the temporary injunction should be reversed.

Respectfully submitted,

Wm H. Neblett,
615 Latham Square Bldg.,
Oakland, California,
Attorney for Appellant.